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## ENACTING THE ‘CIVILIAN PLUS’: INTERNATIONAL HUMANITARIAN ACTORS AND THE CONCEPTUALIZATION OF DISTINCTION

Rebecca Sutton<sup>1</sup>

### *Introduction*

International Humanitarian Law (IHL) has long focused on the distinction between combatants and non-combatants in wartime. Positivist and doctrinal approaches to IHL have tended to overlook the subjectivity of on-the-ground practice, failing to appreciate that many conflict actors do not passively receive legal categories but rather are sophisticated agents who produce the labels they want affixed to them.<sup>2</sup> Meanwhile, the civilian-combatant frame has persisted as the main legal lens through which lawyers organize the relationships of conflict zone actors. As a result, little attention has been paid to different gradations of ‘civilianness’ and the ways in which some civilians might compete to distinguish themselves from each other.<sup>3</sup> Drawing attention to the situation of international civilian actors who deliver humanitarian services in armed conflict—particularly those working for non-governmental

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<sup>2</sup> The closest relevant literature would be emerging political science scholarship on civilian self-protection. See e.g. B. Jose and P. A. Medie, ‘Understanding Why and How Civilians Resort to Self-Protection in Armed Conflict’, (2015) 17 ISR 515.

<sup>3</sup> This is partly because the main onus of upholding the civilian–combatant separation is on the parties to the conflict. See e.g. Art 51(7) and Art 58(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, Can TS 1991 No 1 (‘AP I’). See also Art 4(a)(4) of Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Can TS 1965 No. 20 (‘GC III’).

organizations (NGOs)—this article explores the micro-strategies these actors engage in to negotiate their relative status in war. The figure of the humanitarian actor merits attention because it is caught up in the contradictions of the law in a way that members of the general civilian population are not. The humanitarian actor is a professional actor who bears specific responsibilities under IHL, as well as to the parties to the conflict and civilian populations. In South Sudan, which serves as the case study for this article, humanitarian actors can be found jostling for status with various types of international actors that share the operational space – including other civilians.

This article takes an ethnographically-informed socio-legal approach to offer a fresh perspective on the relationship between international humanitarian actors and IHL's principle of distinction. The first section outlines the IHL rule and engages with scholarship on the conduct of hostilities that exposes the ambiguity, instability and indeterminacy of distinction. The article demonstrates that distinction is already a deeply messy and chaotic idea; this is apart from, and prior to, anything that is going on as a matter of on-the-ground practice. Such problems are, of course, not confined solely to this particular rule nor to IHL as a body of law. The observations advanced here are thus relevant to wider debates on the indeterminacy of international legal rules.<sup>4</sup> The second section directs focus to the figure of the humanitarian actor, advancing the claim that a Red Cross fantasy circulates in the IHL rules governing humanitarian assistance. That is, the humanitarian actor envisaged as meriting protection under IHL takes the specific form of someone who works for the Red Cross - or who resembles those who do. While IHL provides a base level of protection to all civilian humanitarian actors to legally shield them from targeting, those who conform to the Red Cross

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<sup>4</sup> On the indeterminacy of international law see generally M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005).

image are singled out for special treatment. Those humanitarian actors left behind are not legible to IHL as humanitarians and are thus relegated to being (another) one of IHL's 'others'.<sup>5</sup> As a matter of practice, I find that these 'others' are longing for something more than ordinary civilian status. Such yearning is incomprehensible in a world that is governed by a unified civilian category, but it is fathomable if one contemplates a continuum of civilianness that breaks apart the civilian category. As the third section demonstrates, it is the latter vision that humanitarian NGO actors promulgate in everyday practice. This empirical section presents two sets of encounters in South Sudan, each involving humanitarian NGO actors and members of the UN peacekeeping mission in South Sudan (UNMISS). It is shown that humanitarian actors assert a claim to a special form of civilianness on a daily basis, dissociating from those actors they view as lesser civilians. In this way, the idea of distinction circulates in civilian-civilian relations. The fourth and final section advances the claim that international humanitarian actors are producing a 'civilian plus' figure.

It should be noted at the outset that this article does not grapple with the issue of whether the practices of humanitarian actors are inherently desirable.<sup>6</sup> This deferral of the normative question is designed to be a corrective: concerns about the destabilizing potential of such dynamics have led to their neglect, thwarting our understanding of what is actually going on. Taking a sideways look at distinction, the article positions these humanitarian practices as part of the everyday life of an already-disrupted IHL targeting rule.

## **1. The principle of distinction in IHL**

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<sup>5</sup> See A. Orford (ed.), *International Law and its Others* (2006), and in particular F. Mégret, 'From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'', in Orford (ed.), 265 at 266.

<sup>6</sup> That issue is addressed in R. Sutton, 'The 'Phantom Local' and the Everyday Distinction Practices of Humanitarian Actors in War: A Socio-Legal Perspective', (2018) 40 NPS 640.

Leaving humanitarian actors aside for a moment, this section addresses the formulation of the principle of distinction and the definition of the civilian in the 1977 First Additional Protocol (AP I) of the Geneva Conventions of 1949 (GCs). Engaging with critical scholarly perspectives, it is shown that distinction is an unstable concept that produces chaos. This disruption precedes anything wrought through the engagement of international humanitarian actors. The point being stressed here is that humanitarian actors are not undermining distinction, so much as they are engaging with its pre-existing disorder and ambiguity. This is to say: humanitarians are making, not (only) breaking, distinction.

### ***1.1. The AP I Rule***

As codified in Article 48 of AP I, the principle of distinction requires parties to the conflict to distinguish between the civilian population and combatants, as well as between civilian objects and military objectives.<sup>7</sup> This rule offers protection to civilians and civilian objects, while opening up combatants and military objectives to attack.<sup>8</sup> At the same time as the principle of distinction was codified, the civilian was defined in IHL for the first time.<sup>9</sup> Under Article 50, the civilian is defined in a negative manner as anyone who is not a combatant.<sup>10</sup> This residual definition treats the civilian figure as something of an afterthought.<sup>11</sup> It can be gleaned from AP I that a civilian will generally not wear a uniform, not carry a weapon and not participate

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<sup>7</sup> Art 48 of AP I.

<sup>8</sup> Y. Dinstein, 'The Principle of Proportionality', in K. Mujezinovic Larsen, C. Cooper and G. Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (2013), 72 at 74.

<sup>9</sup> Art 50 of AP I. As per A. Alexander, 'The Genesis of the Civilian', (2007) 20 LJIL 359, at 359–360.

<sup>10</sup> Art 50 of AP I. Discussed in A. MacDonald, 'The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities', (2004) *Spotlight on Issues of Contemporary Concern in International Humanitarian Law and International Criminal Law*, Working Paper, University of Tehran Round Table.

<sup>11</sup> E. Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (2015), 233 (the civilian is given 'short shrift' in AP I); Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), 114 (IHL does not 'tell us who or what the protected persons and objects are').

in hostilities, but IHL offers no definitive visual markers or features to confirm civilian identity.<sup>12</sup> While IHL imposes clear reciprocal duties to uphold distinction on those engaged in fighting, the responsibilities of civilians in this respect are only implied.<sup>13</sup>

According to the International Committee of the Red Cross (ICRC) Commentaries to the APs, the negative definition of the civilian is intentional.<sup>14</sup> This formulation is designed to expand the breadth of protection, espousing benefits of comprehensiveness, inclusiveness and clarity.<sup>15</sup> As every individual is supposed to fall into one of the two categories (and not both),<sup>16</sup> there should be no ‘undistributed middle’ between the civilian and combatant categories.<sup>17</sup> As will now be demonstrated, however, the promised clarity of the AP I definition ultimately proves to be a mirage. The notion of a bright line binary recedes from view as soon as one looks more closely at the principle of distinction and related IHL rules – never mind actual practice on the ground.

## ***1.2. Uncovering distinction’s instability***

Scholars inside and outside of the legal academy have begun to expose distinction’s contradictions. Helen Kinsella argues that the dominant narrative of the principle of distinction projects a misleading prototype onto the past: it positions the combatant and civilian in some kind of stable, inevitable and well-defined opposition to one another.<sup>18</sup> When

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<sup>12</sup> C. Garbett, *The Concept of the Civilian: Legal Recognition, Adjudication and the Trials of International Criminal Justice* (2015), 100 (arguing nonetheless that IHL solves the ambiguity of civilian status in AP I; 69).

<sup>13</sup> See above note 3.

<sup>14</sup> C. Pilloud, Y. Sandoz, C. Swinarski et al. (eds.), *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 609–611 (‘AP Commentary’). Discussed in H. Kinsella, *The Image Before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (2011), 142.

<sup>15</sup> Ibid.

<sup>16</sup> A. Alexandra, ‘Private Military and Security Companies and the “Civilianization” of War’, in D. Lovell and I. Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (2012), 183, 187.

<sup>17</sup> Dinstein, *supra* note 11, at 142 (*Conduct of Hostilities*).

<sup>18</sup> Kinsella, *supra* note 14, at 24.

observers lament the blurring of the distinction in contemporary conflict, Kinsella argues, they buy into this dominant narrative.<sup>19</sup> This overlooks the manner in which IHL generates and produces the subjects it claims to protect.<sup>20</sup> Amanda Alexander emphasizes that the civilian is a relatively recent legal invention,<sup>21</sup> and demonstrates that civilian protections codified in the APs are not so sweeping as they first appeared.<sup>22</sup> As Frédéric Mégret shows in his excavation of the combatant category, certain fighters - today's 'unlawful combatant' and yesterday's 'savage' - are also placed outside of IHL's protective framework. IHL's protections are thus '...gained by denial of an 'other' – an 'other' that is both a figure excluded from the various categories of protection, and an elaborate metaphor of what the laws of war do not want to be.'<sup>23</sup> Mégret further suggests that IHL's traditional paradigm of warfare indulges a 'fantasy of sameness': two opposing armies face each other on the battlefield, each in uniform and bearing arms.<sup>24</sup> This notion of an IHL fantasy will be revisited in Section 2 of the article.

However provocative these perspectives might appear, what is arguably more striking are the efforts made by international lawyers and protection advocates to conceal distinction's disorder. Nathaniel Berman contends that ICRC lawyers make (futile, counterproductive) decrees about 'the rigorous difference between combatants and civilians' in an attempt to forestall the destabilization of the *jus in bello*.<sup>25</sup> Such defences are necessary because the implementation of IHL as a body of law is routinely tied to distinction's observance. For

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<sup>19</sup> Ibid., 5.

<sup>20</sup> Ibid., 190.

<sup>21</sup> A. Alexander, 'A Short History of International Humanitarian Law', (2015) 26 EJIL 109.

<sup>22</sup> A. Alexander, 'International Humanitarian Law: Postcolonialism and the 1977 Geneva Protocol I', (2016) 17 MJIL 15, at 36 (IHL's civilian protection rules are replete with 'cautious disclaimers and imprecise provisions').

<sup>23</sup> Mégret, *supra* note 5, at 266.

<sup>24</sup> Ibid., 307, 311. See also N. Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law', (2011) 16 JCSL 225.

<sup>25</sup> N. Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', (2004) 43 CJTL 1, at 54 (discussing the 'part-time combatant'). See also N. Boehland, *The People's Perspectives: Civilian Involvement in Armed Conflict* (2010).

example, the ICRC Commentary on the APs of 1977 refers to the principle of distinction as ‘the basis for the law of armed conflict’,<sup>26</sup> and the International Court of Justice describes this ‘intransgressible’ principle as a ‘fundamental’ component of IHL.<sup>27</sup>

Focusing on AP I now, several rules undermine the notion of a bright line civilian-combatant distinction. Some examples include: the Article 37(1) prohibition on perfidy, which shows the capacity for authentic and simulated civilians;<sup>28</sup> Article 44(3), which relieves fighters of the obligation to distinguish themselves in specified circumstances;<sup>29</sup> and the Article 50(1) presumption in favour of civilian status, which incorporates into the civilian category individuals whose status is open to question.<sup>30</sup> The most destabilizing rule of all is arguably that of direct participation in hostilities, or DPH.<sup>31</sup> Article 51(3) of AP I contains the crucial qualification that civilians who participate in fighting may lose their immunity.<sup>32</sup> The armed/unarmed marker may serve as an indicator of civilian immunity, but it is an actor’s conduct that is decisive.<sup>33</sup> While international lawyers expected conversations about DPH to re-invigorate IHL in the midst of the ‘Global War on Terror’,<sup>34</sup> these debates have instead

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<sup>26</sup> See AP Commentary, *supra* note 14, at 438.

<sup>27</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, para. 257.

<sup>28</sup> See Art 37 of AP I; Art 37(1) in AP Commentary, *supra* note 14, at 435; Rule 65 of the ICRC Customary Law Study. Available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule65](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule65).

<sup>29</sup> Art 43(3) of AP I states that, where a combatant cannot distinguish himself due to the nature of hostilities, ‘he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate’. Discussed in Crawford, *supra* note 11, 41–42.

<sup>30</sup> Discussed in Kinsella, *supra* note 14, at 5, 143–144.

<sup>31</sup> Art 51(3) of AP I.

<sup>32</sup> Art 51(3) of AP I.

<sup>33</sup> H. Slim, *Killing Civilians: Method, Madness, and Morality in War* (2010), 210. See also *Prosecutor v Blagoje Simic et al.* (Judgment) ICTY IT-95-9-T (17 October 2003), para. 659 (mere possession of a weapon does not create ‘reasonable doubt’ of civilian status). See also MacDonald, *supra* note 10 (DPH re-orders civilians according to relative innocence); Kinsella, *supra* note 14, at 144 (DPH undermines the notion of a civilian-combatant opposition).

<sup>34</sup> N. Modirzadeh, ‘Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance’, (2014) 5 HNSJ 225, at 301–302.



highlighted distinction's contested nature.<sup>35</sup> This has not been resolved, and the existence of the DPH concept makes a bright-line binary distinction difficult to sustain.

In light of the above, the problem is not so much that IHL sets up the civilian as a black box. It is rather that the principle of distinction rests on ambiguity, uncertainty, and contingency. Dominant narratives of IHL somehow manage to convey precisely nothing about the civilian, while at the same time establishing a nebulous and even contradictory civilian figure. This haziness continues in the treatment of international humanitarian actors in IHL doctrine.

## **2. The legibility of the international humanitarian actor in IHL**

The exact relationship between the international humanitarian actor and IHL's civilian category tends to be obscured in legal doctrine, scholarly accounts and actual practice. I argue that this fuzzy treatment makes it possible to set up (some) humanitarian actors as the subjects of special protection and privilege, without framing this as reliant upon—or as engendering—the fragmentation of IHL's civilian category. After reviewing the legal protections afforded to international humanitarian actors, this section advances the claim that a Red Cross fantasy circulates in IHL.<sup>36</sup>

### ***2.1. The treatment of the humanitarian actor in international law***

IHL forms part of a larger patchwork of laws that regulate humanitarian assistance in armed conflict.<sup>37</sup> The first issue of interest is the way in which IHL positions humanitarian actors in

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<sup>35</sup> Ibid.

<sup>36</sup> Although medical personnel are not addressed explicitly here, it should also be noted that IHL accords special protections and privileges to this group of actors. See Rule 25 of ICRC Customary Law Study. Available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule25](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule25).

<sup>37</sup> See F. Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict', (2011) 93 IRRC 993, 995–996; R. Barber, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights

relation to the wider civilian category. A preliminary point is that IHL contains no category of ‘humanitarian actor’ as such.<sup>38</sup> The provision of succour to certain individuals in war formed part of the first GC in 1864, and there was passing mention of the ICRC and other actors in the GCs of 1949.<sup>39</sup> However, civilian actors delivering (what would today be called) humanitarian assistance were not explicitly addressed in IHL until the APs of 1977. Typically referring to the relevant actors as ‘relief personnel’, protections under the APs are premised upon one’s ability to deliver assistance in a manner that is humanitarian, impartial and without adverse distinction.<sup>40</sup> This emphasis on conduct and modalities of assistance helps to explain the slipperiness of the humanitarian actor category.

According to Article 71(2) of AP I, in international armed conflicts, those engaged in war fighting are required to respect and protect humanitarian actors.<sup>41</sup> International lawyers and scholars have espoused differing interpretations of this provision in recent years, specifically with respect to the way in which it positions humanitarian actors *vis a vis* the general civilian population. Larissa Fast and Claudie Barrat, respectively, read Article 71(2) as grouping humanitarian actors together with other civilians in one comprehensive civilian category.<sup>42</sup>

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Law’, (2009) 91 IRRC 395; R. Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’, (2004) 86 IRRC 515, at 516; D. Fisher, ‘Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis’, (2007) 89 IRRC 345. See also A. J. Zwitter et al. (eds.), *Humanitarian Action: Global, Regional and Domestic Legal Responses* (2014) (arguing that international law is progressing towards a coherent law of humanitarian assistance).

<sup>38</sup> See H. Durham and P. Wynn-Pope, ‘Protecting the “Helpers”: Humanitarians and Health Care Workers During Times of Armed Conflict’, (2011) 14 YIHL 327, at 337.

<sup>39</sup> See also AP Commentary, *supra* note 14, 831. Initially, the draft version of AP I also contained no separate provision for relief personnel.

<sup>40</sup> D. Akande and E. Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (UN Office for the Coordination of Humanitarian Affairs, 2016), 14.

<sup>41</sup> Art 71(2) of AP I. There is no equivalent rule in AP II, though medical relief is clearly protected under Art 9 of AP I. Protections for humanitarian actors in NIACs ‘as civilians’ can be derived from customary law. See K. Mackintosh, ‘Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and their Staff in International Humanitarian Law’, (2007) 89 IRRC 113, at 118. The term ‘respect’ here is interpreted to mean ‘to spare, not to attack’, while protect means ‘to come to someone’s defence, to lend help and support’. See J. Pictet (ed.), *Commentary: IV Geneva Convention, Relative to the Protection of Civilian Persons in Time of War* (1958), 146 (‘GC IV Commentary’). Discussed in Durham and Wynn-Pope, *supra* note 38, at 337.

<sup>42</sup> See L. Fast, *Aid in Danger: The Perils and Promise of Humanitarianism* (2014), 197; C. Barrat, *Status of NGOs in International Humanitarian Law* (2014), 323.

This gives humanitarian actors civilian status, nothing more and nothing less. Helen Durham and Phoebe Wynn-Pope propose instead that Article 71(2) sets relief personnel apart from the general civilian population, giving humanitarian actors a ‘more substantial footing and a specific status’ than they had under the GCs.<sup>43</sup> On this logic, IHL establishes a carve-out for humanitarian actors in the same legal moment it first defines the civilian – that is, in AP I.<sup>44</sup> Durham and Wynn-Pope’s claim that AP I gives special treatment to some humanitarian actors is persuasive, though I would emphasize that this applies to only a small subset of those who self-identify as humanitarian.<sup>45</sup>

A point that now merits attention is the fact that humanitarian actors, as a larger group, have often been treated differently from the general civilian population in international law more broadly. Focusing on the past two decades or so, humanitarian actors have been singled out for special treatment in official UN pronouncements and international criminal law instruments. Consider the Rome Statute of the International Court of 1998.<sup>46</sup> Article 8(2)(e)(ii) of the Rome Statute prohibits intentional attacks against buildings, material, medical units and transport systems, as well as personnel using the ‘distinctive emblems of the Geneva Conventions in conformity with international law’.<sup>47</sup> Article 8(2)(e)(iii) further prohibits intentional attacks against ‘personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission’ in accordance with the UN Charter, ‘as long as they are entitled to the protection given to civilians or civilian objects’ under IHL.<sup>48</sup> Given

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<sup>43</sup> Durham and Wynn-Pope, *supra* note 38, at 337.

<sup>44</sup> See above note 9 and earlier argument that the civilian is not formally defined until AP I.

<sup>45</sup> See 2.2, below. Elsewhere, I depart from the authors’ view that such special treatment is desirable as a normative matter. See R. Sutton, *The Humanitarian Actor as ‘Civilian Plus’: The Circulation of the Idea of Distinction in International Law* (unpublished PhD Thesis, 2018).

<sup>46</sup> UN GA, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

<sup>47</sup> Art 8(2)(e)(ii) of the Rome Statute. Discussed in Schwendimann, *supra* note 37, at 1005 (noting that a nexus with an armed conflict is required). See also Art 8(2)(b)(xxiv) which applies in international armed conflicts.

<sup>48</sup> Art 8(2)(e)(iii) of the Rome Statute. See also Art 8(2)(b)(iii) which applies in international armed conflicts.

that the Rome Statute already deems intentional attacks against the general civilian population (and individual civilians who do not DPH) to be war crimes,<sup>49</sup> these dedicated provisions appear to treat humanitarian actors exceptionally.<sup>50</sup> This special treatment is amplified in UN pronouncements since the mid-1990s that condemn attacks on humanitarian actors as especially egregious.<sup>51</sup>

Cutting in the other direction, the same international criminal law provisions enumerated above include the caveat that humanitarian actors might in some instances merit something less than civilian protection. Article 8(2)(e)(iii) of the Rome Statute stipulates that, to be covered by the relevant provision, a given actor must be entitled to the protection given to civilians (or civilian objects).<sup>52</sup> The loss of civilian protection might occur, most obviously, if a humanitarian actor were to DPH.<sup>53</sup> As a matter of everyday practice and perception, this also speaks to humanitarian actors' fears that their own civilianness will be tainted or downgraded.<sup>54</sup>

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See also Art 4 of the Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, Appendix II.

<sup>49</sup> Art 8(2)(b)(i) and Art 8(2)(e)(i) of the Rome Statute, which apply to international armed conflicts and 'conflicts not of an international character', respectively.

<sup>50</sup> See also E. Leclerc-Gagné, *The Construction of the Humanitarian Worker as Inviolable Actor* (unpublished PhD thesis, 2014), 137–139 (observing that the Article 8(2)(b)(i) prohibition on attacks against the wider civilian population appears only two clauses prior to Art 8(2)(b)(iii)).

<sup>51</sup> See e.g. UNSC, 'Increased Attacks on Aid Workers Due to Lack of Respect for International Humanitarian Law, Deputy Secretary-General Tells Security Council' (19 August 2014) United Nations Meetings Coverage, SC/11524. Resolutions calling for those engaged in war-fighting to respect and protect humanitarian actors include: UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894; UNSC Res 1502 (26 August 2003) UN Doc S/RES/1502. See also: (UN General Assembly) UNGA Res 52/167 (1997), A/RES/52/167 (condemning any act or failure to act 'which obstructs or prevents humanitarian personnel from discharging their humanitarian functions'); UNGA Res 53/164 (1998), A/RES/53/164; UNGA Res 54/192 (1999), A/RES/54/192.

<sup>52</sup> See above note 48. The same language can be found in Art 8(2)(b)(iii), which applies to international armed conflicts.

<sup>53</sup> See discussion of DPH above. For an argument that humanitarian actors who are involved in peace enforcement missions lose civilian status see A.P.V. Rogers, *Law on the Battlefield* (2012), 319. Note that humanitarian actors who operate without state consent do not lose civilian status. See Akande and Gillard, *supra* note 40, at 51.

<sup>54</sup> See Section 3.

Peering inside the humanitarian actor category now, I contend that IHL's protections of humanitarian actors are premised upon a very specific vision of humanitarianism.

## ***2.2. IHL's Red Cross fantasy***

As mentioned earlier, Mégret argues that IHL projects a vision of wars being fought in a particular, Western, manner.<sup>55</sup> Although fighters that do not live up to the traditional image of the combatant are now allowed to participate, IHL's exclusion of 'other' combatants is ongoing.<sup>56</sup> The efforts that some combatants make to conform to the traditional paradigm of warfare confirm the suggestive power of the archetype, and ensure the continued privilege of conventional combat actors.<sup>57</sup> I propose that IHL projects another fantasy that shapes a different area of practice in warfare: the delivery of humanitarian assistance. IHL envisions a particular kind of humanitarian actor engaging in relief tasks, and this individual works for—or successfully approximates those who work for—the Red Cross.<sup>58</sup>

The special status of the ICRC<sup>59</sup> has its origins in the mythical account of Henri Dunant's experience at Solferino, where Dunant envisioned a Red Cross movement that would promote and safeguard humanitarian ideals.<sup>60</sup> The Red Cross actor materialized in early IHL instruments as a twinkle in Dunant's eye, informing the 1864 GC and securing the Red

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<sup>55</sup> See Section 1.2.

<sup>56</sup> Mégret, *supra* note 5, at 30-32.

<sup>57</sup> *Ibid.*

<sup>58</sup> This is not to say that other kinds of actors cannot legally deliver humanitarian assistance; IHL explicitly empowers states and military actors to do so.

<sup>59</sup> E. Debuf, 'Tools to Do the Job: The ICRC's Legal Status, Privileges and Immunities', (2016) 97 IRRC 319, at 324; K. Dormann and L. Maresca, 'The ICRC and its Contribution to the Development of IHL in Specialized Instruments', (2004-5) 5 CJIL 217, at 217. B. Demeyere, 'Turning the Stranger into a Partner: The Role and Responsibilities of Civil Society in International Humanitarian Law Formulation and Application', (2016) Harvard Program on Humanitarian Policy and Conflict Research Thematic Brief, 8-9 (special privileges and immunities granted to ICRC and related personnel by states on a case-by-case basis). See also: Art 4 of AP I (ICRC serves as a substitute for the Protecting Power, where appropriate); UNGA Res 45/6 (1990), A/RES/45/6 (confirming ICRC observer status at the UNGA).

<sup>60</sup> C. Greenwood, 'Historical Development and Legal Basis', in D. Fleck (ed.), *Handbook on International Humanitarian Law* (2008), 1 at 22.

Cross figure as the touchstone of humanitarian assistance.<sup>61</sup> The Red Cross actor continues as the benchmark for humanitarian relief in the GCs of 1949,<sup>62</sup> though, as mentioned, this instrument does not engage in any depth with the actors who deliver assistance.<sup>63</sup> While the category expands somewhat in AP I, the positioning of the Red Cross as the relief provider *par excellence* is an unchanging feature of IHL.

Coming back to Durham and Wynn-Pope's suggestion that AP I situates humanitarian actors differently than members of the general civilian population, I would stress that this exceptional treatment is limited to actors who reflect the Red Cross ideal.<sup>64</sup> Those humanitarian actors who fall outside this archetype are relegated to being another of IHL's 'others'.<sup>65</sup> This is not to say that restricting the boundaries of the humanitarian actor category is necessarily a bad thing. Indeed, there may be sound reasons for ruling out the participation of certain kinds of players or particular modalities of assistance. The claim being advanced here is simply that many non-Red Cross actors are not legible as humanitarians in IHL. It merits emphasis that these 'other' humanitarians, collectively, carry out the bulk of humanitarian assistance in contemporary armed conflicts.<sup>66</sup>

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<sup>61</sup> Debuf, *supra* note 59, at 320–321.

<sup>62</sup> See Common Art 3 of GC I-IV (referring to an impartial humanitarian body 'such as' the ICRC); Art 63 of GC IV (the occupying power may not require any changes in the personnel or structure of relief societies such as the ICRC that could prejudice relief activities); Art 9 of GC I-III and Art 10 of GC IV (with the consent of the parties to the conflict, the ICRC 'or any other impartial humanitarian organization' may undertake humanitarian activities to protect and provide relief to civilian persons). Discussed in Mackintosh, *supra* note 41, 115–116. Art 63(c) of GC IV opens out a bit further, according a right of humanitarian initiative to 'special organizations of a non-military character' that work to improve the living conditions of the civilian population.

<sup>63</sup> Durham and Wynn-Pope, *supra* note 38, at 336 (The GCs of 1949 focused on the recipients of assistance).

<sup>64</sup> Note that other actors such as medical professionals also receive special privileges and treatment under IHL. See J. Brooks, 'Protecting Humanitarian Action: Key Challenges and Lessons from the Field' (Harvard Humanitarian Initiative and ATHA, 2016), 10. Available at: [http://www.atha.se/sites/default/files/atha\\_key\\_challenges\\_in\\_the\\_protection\\_of\\_humanitarian\\_action.pdf](http://www.atha.se/sites/default/files/atha_key_challenges_in_the_protection_of_humanitarian_action.pdf). See Rule 25 of ICRC Customary Law Study, *supra* note 36.

<sup>65</sup> Drawing again on the terminology in Orford, *supra* note 5, and Mégret, *supra* note 5. There is not scope in this article to address the situation of local humanitarian actors or national staff of humanitarian agencies, but this would be an important dimension to explore. One could argue that local humanitarian actors are the true 'other' humanitarian actors, highlighting the way in which ideals of race, class and civilianization shape the humanitarian fantasy.

<sup>66</sup> The ICRC remains one of the largest operational international humanitarian organizations today, but most

The special treatment of the Red Cross emblem in IHL both emerges from, and perpetuates, the Red Cross fantasy.<sup>67</sup> The emblems of ‘other’ humanitarian actors do not receive the same level of legal protection,<sup>68</sup> and as Kate Mackintosh observes, this generates considerable anxiety for non-Red Cross humanitarians.<sup>69</sup> This points to a curious dynamic. While ‘other’ humanitarian actors lament the extra protections and privileges afforded to the Red Cross, many of the former also espouse a commitment to Red Cross-style principles<sup>70</sup> and subscribe to a Red Cross meta-narrative.<sup>71</sup> The efforts these humanitarian actors make to conform to the IHL fantasy sustain the Red Cross stereotype.

The status of ‘other’ humanitarian actors in IHL merits discussion, focusing here on NGOs and UN humanitarian agencies. Turning first to humanitarian NGOs,<sup>72</sup> certain humanitarian actors such as Médecins Sans Frontières [MSF] may meet the criteria for a number of protected categories contained in the APs.<sup>73</sup> Some humanitarian actors might also claim additional protection through an affiliation with the UN (*e.g.* as ‘associated personnel’,

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humanitarian assistance is delivered by non-Red Cross actors. See J. Kellenberger, ‘The Role of the International Committee of the Red Cross’, in A Clapham and P Gaeta (eds.), *Oxford Handbook of International Law in Armed Conflict* (2014), 20. In 2007, approximately 58 per cent of humanitarian assistance was delivered by NGOs. See P. Walker and K. Pepper, *Follow the Money: A Review and Analysis of the State of Humanitarian Funding* (Feinstein International Center, 2007). In 2015 and 2016, funding to NGOs as a proportion of total international humanitarian assistance (from private, governmental and EU donors) was 38 and 35 per cent, respectively. This reflects only direct funds and does not account for all of the resources sub-granted to NGOs by other aid recipients, such as UN agencies. See Development Initiatives, *Global Humanitarian Assistance Report 2018*. Available at: <http://devinit.org/wp-content/uploads/2018/06/GHA-Report-2018.pdf>, Chapter 4.

<sup>67</sup> The focus here is on the Red Cross emblem, specifically, rather than the sun, crescent, lion or crystal. On the special treatment of the emblem in IHL see AP Commentary, *supra* note 14, at 832; Demeyere, *supra* note 59, at 11. See also B. Rolle and E. Lafontaine, ‘The Emblem that Cried Wolf: ICRC Study on the Use of Emblems’, (2009) 91 IRRC 759.

<sup>68</sup> K. Van Brabant, ‘Operational Security Management in Violent Environments’ (2000) Humanitarian Policy Network Good Practice Review, 336; Demeyere, *supra* note 59, at 11.

<sup>69</sup> Mackintosh, *supra* note 41.

<sup>70</sup> For an argument that NGOs that follow Red Cross-style principles may claim IHL’s protections, see E. Kuijt, ‘A Humanitarian Crisis: Reframing the Legal Framework on Humanitarian Assistance’, in Zwitter et al. (eds.), *supra* note 37, 54 at 66–67.

<sup>71</sup> K. Davies, *Continuity, Change and Contest: Meanings of ‘Humanitarian’ from the ‘Religion of Humanity’ to the Kosovo War* (Humanitarian Policy Group, 2012).

<sup>72</sup> On the lack of crystalized legal personality in international law for NGOs see Kuijt, *supra* note 70, 66–67.

<sup>73</sup> Barrat argues that MSF likely fits into the following IHL categories: medical personnel, substitute protecting power, impartial humanitarian body, relief society, social organization and organization assisting protected persons. See Barrat, *supra* note 42, at 340, Table 2.

sub-contractors or implementers)<sup>74</sup> or with the Red Cross.<sup>75</sup> Generally speaking, however, most humanitarian NGO actors will have the same base level of IHL protection as the general civilian population. UN humanitarian actors are in a somewhat better position, as their emblems,<sup>76</sup> facilities<sup>77</sup> and personnel<sup>78</sup> enjoy further privileges and protections under international law. Still, UN humanitarian actors fail to match the Red Cross fantasy. What is more, their connection to the larger UN political or peacekeeping mission may generate additional (material) dangers.

A question that will be of interest for international lawyers is whether, and to what extent, the differential positioning of Red Cross and ‘other’ humanitarian actors matters in IHL. For the narrow purpose of targeting in the conduct of hostilities, one might argue from a positivist perspective that the impact of this differential treatment is negligible. Under IHL, civilian humanitarian actors will be legally, if not materially, protected from direct targeting unless and until they do something to undermine their civilian immunity – such as DPH. Such an account situates all civilian actors together in a unified civilian category, conferring additional privileges to Red Cross actors on top of basic civilian status.<sup>79</sup>

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<sup>74</sup> E. Weir, ‘Conflict and Compromise: UN Integrated Missions and the Humanitarian Imperative’ (2006) Kofi Annan International Peacekeeping Training Centre Monograph, 44; Mackintosh, *supra* note 41, at 114; C. Bourloyannis-Vrailas, ‘The Convention on the Safety of United Nations and Associated Personnel’, (1995) 44 ICLQ 560, at 564–566.

<sup>75</sup> Weir, *supra* note 74, 44.

<sup>76</sup> On the treatment of the UN flag and logo in the Rome Statute, see Art 8(2)(b)(vii) of UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

<sup>77</sup> L. R. Blank, ‘The Limits of Inviolability: The Parameters for Protection of United Nations Facilities During Armed Conflict’, (2017) 93 ILS 45, at 62.

<sup>78</sup> UN Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363 (‘1994 Convention’); UN Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 21 UST 1418, TIAS No. 6900, 1 UNTS 15 (‘1946 Convention’). Discussed in Bourloyannis-Vrailas, *supra* note 74; Blank, *supra* note 77, at 50. See also T. Ferraro, ‘The Applicability of International Humanitarian Law to Multinational Forces’, (2013) 95 IRRC 561.

<sup>79</sup> A parallel can be found in the ICRC Commentary with respect to the issue of granting special privileges or protections to certain segments of the civilian population under GC IV of 1949. The Commentary asserts that special protections are ‘not instead of, but in addition to the protection given generally’. See 1958 Commentary to GC IV re: Art 16(2) of GC IV.



In my view, this doctrinal outlook is both incomplete and untenable in the face of the subjectivities of on-the-ground practice. I want to contest, in particular, the notion that a unified civilian category remains intact while extra privileges and protections are afforded to certain civilian actors. I propose instead that IHL's special treatment of (some) humanitarian actors splinters the civilian category and sets up civilian-civilian distinctions. This undermines the notion that all civilians are equal under IHL, putting pressure on the normative ideal of a unified civilian category. It should be noted that this ideal is already under considerable strain, not only from concepts such as DPH but also from the differential treatment IHL affords to various civilians – such as children, women and civil defence forces.

Staying with a focus on humanitarian actors, a point of great significance is that both Red Cross and 'other' humanitarian actors can be found claiming an especially pure kind of civilianness in everyday practice.<sup>80</sup> The next part of the discussion illuminates the special civilian status that international humanitarian NGO actors operationalize on a daily basis.

### **3. Distinction in Humanitarian-UNMISS encounters**

The empirical component of this article makes an excursion to the site of an armed conflict in which international humanitarian actors struggle over distinction with UN peacekeeping mission actors. The South Sudan context captures these struggles well: since 2011 it has hosted an integrated UN mission with a robust Protection of Civilians (PoC) mandate,<sup>81</sup> and since 2013 many international humanitarian actors have been operating within PoC sites that are guarded by armed peacekeepers. To properly situate the empirical material, and to explain how

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<sup>80</sup> This broader claim is substantiated in the wider study. See Sutton, *supra* note 45 (*The Humanitarian Actor*).

<sup>81</sup> See 3.2, below.

a socio-legal approach to everyday practice can be applied to the idea of distinction, a methodological discussion is in order.

### ***3.1. Methodology***

Scholars of international law are increasingly turning to socio-legal methodology, sometimes pairing it with anthropological methods<sup>82</sup> and a focus on everyday life.<sup>83</sup> The present article brings an ethnographically-informed<sup>84</sup> socio-legal methodology to bear upon IHL and humanitarian practice. This approach illuminates the everyday distinction practices that humanitarian actors engage in, uncovering the daily, relational, efforts humanitarians make to enact distinction and assert their civilian identity. IHL plays an instrumental as well as a constitutive role in these practices, and a socio-legal approach illuminates both dimensions.<sup>85</sup> Humanitarian actors can be found identifying, adopting, applying, developing, re-shaping and complicating IHL norms and rules.<sup>86</sup> IHL's civilian category also shapes humanitarian actors' self-conceptualization, even as they adapt this category to suit their needs.

A wider 'turn to practice' is also underway in international legal scholarship, extending beyond the socio-legal field.<sup>87</sup> When practice is the focal point of an investigation, description

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<sup>82</sup> S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013).

<sup>83</sup> L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015). On the socio-legal study of law in everyday life see A. Sarat and T. R. Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life', in A. Sarat and T. R. Kearns (eds.), *Law in Everyday Life* (1993), 21.

<sup>84</sup> The article is part of a larger study, which relies on extensive qualitative empirical material gathered through participant-observation and interviews conducted in South Sudan and at civil-military trainings held in Sweden, Germany and Italy. See note 94, below.

<sup>85</sup> Sarat and Kearns, *supra* note 83, at 29, 32.

<sup>86</sup> In the parlance of the legal consciousness literature, this might also be conceptualized as humanitarian actors 'playing with the law'. P. Ewick and S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998). On legal consciousness and the humanitarian actor subject position (in the context of duty of care litigation) see K. Bergtora Sandvik, 'Humanitarians in Court: How Duty of Care Travelled from Human Resources to Legal Liability', (2018) 50 JLPUL 358.

<sup>87</sup> L. M. Boer, 'The Greater Part of Juriconsults: On Consensus Claims and their Footnotes in Legal Scholarship', (2016) 29 LJIL 1021, at 1041–1042.

is understood as valuable in its own right.<sup>88</sup> There is deeper point to be made here about legal pluralism as well. That is, the attention to practice illuminates the ways in which non-traditional actors, operating in unconventional sites, shape international law's meaning. As Lianne Boer observes, centering practices shows that 'the law is "made" by those working with it, and there are very many people doing so, in many different capacities'.<sup>89</sup> Scrutiny of actual practice is also instructive because IHL rules, like the rules of international law more broadly, are open to alternative, and potentially contradictory, meanings.<sup>90</sup> The framers of IHL provisions may have deliberately encoded them with ambiguity, and a certain amount of indeterminacy may have been deemed desirable.<sup>91</sup> As was shown earlier in this discussion,<sup>92</sup> the principle of distinction is one such provision.

In the empirical discussion that follows in Section 3.3, below, the practices and interactions of humanitarian and UNMISS actors are condensed into a series of encounters.<sup>93</sup> The qualitative empirical material presented here has been selected on the basis that it showcases some salient aspect of (distinction in) the humanitarian-UNMISS relationship. These relatively brief accounts are drawn from a more extensive repository of relevant interactions, which was generated through original fieldwork conducted in South Sudan. In 2015 I carried out a total of 113 interviews in South Sudan and engaged in over 100 hours of participant-observation.<sup>94</sup>

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<sup>88</sup> A. Orford, 'In Praise of Description', (2012) 25 LJIL 609.

<sup>89</sup> Boer, *supra* note 87, at 1041–1042.

<sup>90</sup> M. Koskeniemi, 'Occupied Zone: A Zone of 'Reasonableness'?', (2008) 41 ILR 13, at 40 (on the limitations of bright-line rules in the Israeli-Palestinian conflict); A. Alexander, *The Idea of the Civilian in International Law* (unpublished PhD thesis, 2013), 14.

<sup>91</sup> T. Meron, *War Crimes Law Comes of Age* (1998), 159; Kinsella, *supra* note 14, at 189.

<sup>92</sup> See Section 1.

<sup>93</sup> Drawing on Erving Goffman's concept of the encounter, which is defined as the 'natural unit of social organization in which focused interaction occurs'. See E. Goffman, *Encounters; Two Studies in the Sociology of Interaction* (2013), 8.

<sup>94</sup> I conducted fieldwork in August and September 2015 in Bor, Jonglei state; Bentiu, Unity state; and Juba, Central Equatoria state. 55 interviews were conducted with key informants, and 58 individuals were consulted through focus group discussions. The present discussion is primarily based on 48 interviews conducted with

### ***3.2. Background on intervention in South Sudan***

Following South Sudan's independence referendum in 2011, UNMISS was installed in Juba with a UN Security Council Chapter VII authorization to 'consolidate peace and security and to help establish conditions for development' in South Sudan.<sup>95</sup> The mission's strong PoC mandate was subsequently 'reinforced' in a 2014 UN Security Council Resolution.<sup>96</sup> South Sudan's PoC sites were initially formed in December 2013, when UNMISS staff opened the gates of UN bases in response to the (eventually) hundreds of thousands of individuals fleeing the outbreak of violence.<sup>97</sup> These were the early days of an internal conflict that engulfed newly independent South Sudan. The conflict was initially rooted in a power struggle between President Kiir and Vice President Riek Machar, cutting along ethnic lines as Dinka clashed with Nuer.<sup>98</sup>

The international community generally treats the displaced populations residing in South Sudan's PoC sites as civilians.<sup>99</sup> However, local players—including Government of

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individuals working for UNMISS, humanitarian NGOs, and other international agencies during the 2015 visit. The analysis is also informed indirectly by earlier visits to South Sudan in 2010, 2011 and 2014 as well as field experience running a humanitarian NGO mission in Darfur, Sudan from 2009-2011.

<sup>95</sup> Chapter VII entitles UN forces to engage in robust use of force, and to use 'all necessary means' to self-protect, protect the civilian population and humanitarian actors. UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996. UNMISS replaced UNMIS, which had been installed in 2005 under UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590.

<sup>96</sup> UNSC Res 2155 (27 May 2014) UN Doc S/RES/2155. At the time field research was conducted for this article, UNMISS was composed of 12,523 uniformed personnel, 796 international civilian personnel, 1,204 local civilian personnel and 409 UN Volunteers. 'UNMISS Facts and Figures', UNMISS website, June 2015. In this article, UN Volunteers, international and local civilian personnel are loosely grouped together as 'UNMISS civilian staff'.

<sup>97</sup> M. Arensen, *If We Leave We Are Killed: Lessons Learned from South Sudan Protection of Civilians Sites* (International Organization for Migration, 2016), 12; D. Lilly, 'Protection of Civilians Sites: A New Type of Displacement Settlement?' (2014) Humanitarian Exchange Magazine No.62. Available at: <http://odihpn.org/magazine/protection-of-civilians-sites-a-new-type-of-displacement-settlement/>.

<sup>98</sup> It is generally agreed that South Sudan has been a non-international armed conflict since December 2013. See Geneva Academy, Rule of Law in Armed Conflicts (RULAC) project, 'Non-International Armed Conflict in South Sudan'. Available at: <http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-south-sudan#collapse4accord>. See also L. Blanchard, 'Conflict in South Sudan and the Challenges Ahead' (2016) Congressional Research Service Report.

<sup>99</sup> As directly observed during fieldwork in 2015 and reported in key informant interviews.

South Sudan (GoSS) actors, Sudan People's Liberation Army (SPLA) soldiers and other armed groups—routinely question the legitimacy of this designation.<sup>100</sup> Such moves have historical precursors. South(ern) Sudan has long been a context in which civilians are viewed as legitimate targets in armed conflict, especially where they are seen to sympathize with the opposition.<sup>101</sup> There have also been credible allegations that UN forces are failing to fulfil their gatekeeping role at the PoC sites, allowing (ex-) combatants to flow in and out.<sup>102</sup> Displaced individuals have been caught smuggling weapons into the PoC site in Bentiu, Unity State,<sup>103</sup> and some civilians are known to engage in armed vigilante practices.<sup>104</sup> Although South Sudan's PoC sites are somewhat unusual in the sense that armed UN forces are tasked with guarding their perimeter, similar problems have routinely arisen in the context of many other global displacement settings.<sup>105</sup>

With these fluid civilian-combatant dynamics as the baseline, the international humanitarian actors who operate in and around South Sudan's PoC sites face the unnerving prospect that local armed actors will think there are no real civilians. Although this empirical discussion focuses specifically on humanitarian-UNMISS interactions—and the canteens they eat in, the white SUVs they drive—it is crucial to emphasize that these encounters do not take place in a vacuum. If we were to keep humanitarian distinction as the subject of interest but zoom the lens out further, we would see a whole host of actors engaging and contending in

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<sup>100</sup> Ibid. A comparison could be drawn with the UN-protected safe haven of Srebrenica in Bosnia. In that case, perpetrators argued that Bosnian Muslims living inside were using the site to launch attacks against them, and that UN forces were failing to prevent them from doing so. See *Prosecutor v Radislav Krstic* (Judgement) ICTY-IT-98-33-A, 19 April 2004, para 24.

<sup>101</sup> Arensen, *supra* note 97, at 15.

<sup>102</sup> See C. Briggs, *Protection of Civilians Sites: Lessons from South Sudan for Future Operations* (Norwegian Refugee Council, 2017), 64–66.

<sup>103</sup> See Arensen, *supra* note 97, at 58.

<sup>104</sup> See F. McCrone, *Justice Displaced: Field Notes on Criminality and Insecurity in South Sudan's UN Protection of Civilian Sites* (Justice Africa, 2016). This state of affairs was confirmed in field interviews conducted in 2015.

<sup>105</sup> See e.g. S. K. Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid* (2005).

the shared space. Some of these actors might pose a threat to the physical safety of humanitarian actors (*e.g.* violent non-state actors); some could revoke access and permission to operate (*e.g.* state authorities); and some might withhold trust if humanitarians do not project a certain image (*e.g.* beneficiaries).<sup>106</sup> It is within and against this complex cast of characters that humanitarian actors fashion and perform their civilian persona on a daily basis. If, alternatively, we were to zoom the investigative lens further in to peer inside the humanitarian actor category or even inside a single agency, the rich array of local, regional and international actors who engage in humanitarian work would come into view. It should be noted here that local humanitarian actors—a category that also needs unpacking—face a unique array of safety risks in their daily work.<sup>107</sup> These actors might have a very different engagement with the concept of distinction, and this presents an important avenue for future inquiry.

By training the analytical lens on humanitarian-UNMISS interactions, without zooming too far in or out, the empirical discussion sheds light on an oft-overlooked site of practice in which the idea of distinction circulates. The contemporary dynamics explored in this article are part of a much larger story about humanitarian-peacekeeper tensions, which have existed for as long as these actors have operated alongside each other.<sup>108</sup> In the former Yugoslavia in the early 1990s, for example, humanitarian actors voiced fears that they would be endangered by any potential affiliation with actors working for the peacekeeping mission, UNPROFOR.<sup>109</sup> Similar concerns have materialized globally over the ensuing decades, and

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<sup>106</sup> The perceptions of these three sets of local players are discussed in Sutton, *supra* note 6 ('The Phantom Local').

<sup>107</sup> On the safety of local humanitarian actors and the particular security risks they face, see *e.g.* R. Andersson and F. Weigand, 'Intervention at Risk: The Vicious Cycle of Distance and Danger in Mali and Afghanistan', (2015) 9 JIS 519, at 17.

<sup>108</sup> For an overview of humanitarian-peacekeeper relationships until the late 1990s see L. Minear, 'Humanitarian Action and Peacekeeping Operations', (1997) Background paper for UNITAR/IPS/NIRA Singapore Conference. Available at: <https://sites.tufts.edu/jha/archives/110>.

<sup>109</sup> See *e.g.* K. Young, 'UNHCR and ICRC in the Former Yugoslavia: Bosnia-Herzegovina', (2001) 83 IRRC 781.

they have arguably intensified in the current era of UN ‘integration’.<sup>110</sup> Because the neutrality and impartiality of UN peacekeeping missions is widely perceived as either constrained or non-existent,<sup>111</sup> humanitarian actors struggle to interact with UN mission actors while upholding their own traditional humanitarian principles of humanity, independence, impartiality and neutrality.<sup>112</sup> Humanitarian actors often articulate anxieties about peacekeeper encroachment as concerns about the preservation of ‘humanitarian space’.<sup>113</sup> This denotes the room that humanitarian actors have to carry out their tasks unimpeded, and in its traditional formulation the concept precludes engagement by non-humanitarian actors.<sup>114</sup> For those actors who are excluded from the humanitarian space as narrowly conceived, the delineation of such a space gives off more than a whiff of turf protection.

Leaving old debates on humanitarian space behind, the next part of the discussion investigates the way in which distinction is implicated in daily humanitarian-UNMISS interactions. When practice is taken as the starting point, the vision of distinction that materializes bears little resemblance to a bright line civilian-combatant binary.

### ***3.3. Encounters in South Sudan’s PoC sites***

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<sup>110</sup> The challenges that integrated peacekeeping poses for humanitarian action are discussed in Weir, *supra* note 74. On UN Integration policies generally see V Metcalfe et al., *UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group* (Stimson Centre, 2011).

<sup>111</sup> On impartiality in peacekeeping see E. Paddon Rhoads, *Taking Sides in Peacekeeping: Impartiality and the Future of the United Nations* (2016).

<sup>112</sup> On the traditional humanitarian principles see J. Pictet, *The Fundamental Principles of the Red Cross, Commentary* (1979). Not all humanitarian actors claim to be neutral in contemporary conflicts. See H. Slim, *Humanitarian Ethics: A Guide to the Morality of Aid in War and Disaster* (2015), 70.

<sup>113</sup> On humanitarian space see J. G. Wagner, ‘An IHL/ICRC Perspective on “Humanitarian Space”’, (2005) *Humanitarian Exchange Magazine* No. 32; D. Thurer, ‘Dunant’s Pyramid: Thoughts on the “Humanitarian Space”’, (2007) 89 *IRRC* 47; S. Beauchamp, ‘Humanitarian Space in Search of a New Home’, in B Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (2012), 199.

<sup>114</sup> For a critique of the exclusivity of humanitarian space see S. Collinson and S. Elhawary, *Humanitarian Space: A Review of Trends and Issues* (Overseas Development Institute, 2012).

In order to convey the significance of the encounters presented here, the respective IHL statuses of UNMISS peacekeeping forces and civilian staff must first be clarified. Starting with UNMISS forces, such as those who populate peacekeeping battalions, these UNMISS actors generally benefit from the protection afforded to civilians in IHL. This is with the exception of scenarios where the operation as a whole becomes a party to the conflict,<sup>115</sup> or the individual member of the operation engages in DPH.<sup>116</sup> The military aspects of the mission,<sup>117</sup> along with the uniforms that peacekeepers wear and the weapons some carry, do not in and of themselves amount to combatant status under IHL. As for UNMISS civilian staff, such as those engaging in political and human rights activities, these individuals will continue to benefit from the protection IHL affords to civilians even if the operation becomes a party to the conflict.<sup>118</sup> Civilian immunity is maintained so long as an individual's conduct does not meet the threshold for DPH.<sup>119</sup>

The default legal status for both sets of UNMISS actors will thus generally be civilian. As will be shown, however, asserting a distinction from UNMISS is a key way in which humanitarian actors affirm their civilian identity. In the first set of encounters that follows here, humanitarian NGO actors distance themselves from armed UNMISS peacekeepers. In

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<sup>115</sup> A contemporary scenario that tests these limits is the mandate of the Force Intervention Brigade affiliated with MONUSCO in the Democratic Republic of Congo. See UNSC Res 2098 (28 March 2013), UN Doc S/RES/2098; S. Sheeran and S. Case, 'The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo' (International Peace Institute, 2014). See also K. Grenfell, 'Perspective on the Applicability and Application of International Humanitarian Law: the UN Context', (2013) 95 IRRC No. 891/2, at 645.

<sup>116</sup> See International Group of Experts, *Leuven Manual on the International Law Applicable to Peace Operations* (2017), 97–99.

<sup>117</sup> UNMISS signed a Status of Forces Agreement with the GoSS in 2011 which states that UNMISS military personnel will comply with IHL rules. See Section Four of the Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan. Available at: [http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss\\_sofa\\_08082011.pdf](http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss_sofa_08082011.pdf). In 2013, South Sudan ratified GC I-IV of 1949 and AP I-III. See also UNSC Res 2155, *supra* note 96.

<sup>118</sup> Leuven Manual, *supra* note 116, at 97–99.

<sup>119</sup> Ibid.



the second set, humanitarians do the same with UNMISS civilian staff. These interactions are presented from each side in turn, so that the perspectives of humanitarian actors, UNMISS forces, and UNMISS civilian staff all receive consideration. Attending to the views of the two groups of UNMISS actors is revealing: it helps to expose the work that the idea of distinction is doing and conveys the high stakes of a splintered civilian category.

### **Encounter 1(a): Humanitarian actors' perspectives on UNMISS peacekeepers**

*A humanitarian actor who resides in a PoC site in Bentiu, Unity State describes his daily efforts to maintain separation from UNMISS peacekeepers. He recounts an incident in which a Sudan People's Liberation Army (SPLA) soldier behaved menacingly towards him near the entrance gate to the PoC site. At the time, this humanitarian actor was standing near the armed UN peacekeepers that guard the site's perimeter. He deduces that simply standing there put 'me and the peacekeepers in his head, as the same kind of thing'. Another humanitarian NGO actor residing in the Bentiu site reports that SPLA soldiers have called him both 'UN' and 'military'. To mitigate this confusion, he spends a lot of time chatting to SPLA soldiers. '[I]f something happened, I wanted them to know me.' Despite these exertions, his efforts to intervene in a recent incident gave him cause for alarm. Upon observing an altercation between a group of humanitarian actors and SPLA soldiers at the entrance to the site, he elected to intervene. He asked an SPLA soldier he was personally acquainted with to tell his fellow soldiers not to threaten humanitarian actors. The soldier retorted: 'But you're UN.' The humanitarian NGO actor was aghast, imploring: 'You know me, you are my friend. Am I UN?' The soldier replied: 'Well, you are military as well.' The humanitarian actor pushed on, brandishing his civilian credentials: 'Do you ever see me carrying a gun?' Lifting up his shirt, he asked: 'Do I have an imaginary gun, an invisible gun?' Finally, he reminded the soldier that his humanitarian NGO 'has always been your friend, we always come here'. While this particular incident was resolved peacefully, the humanitarian actor is troubled by how sheer physical proximity to peacekeepers translated into a perceived affiliation. He concludes: 'That was a point where I was feeling a little close [to UNMISS].'*

### **Encounter 1(b): UNMISS peacekeepers' perspectives on humanitarian actors**

*It emerges that many UNMISS forces operating in South Sudan's PoC sites believe that, simply by residing in the sites, humanitarian actors have signalled a wish to associate with them. Because of this mindset, UNMISS peacekeepers are perplexed when humanitarian actors treat them as combatant-like figures that are best avoided. When I ask an UNMISS peacekeeper whether living alongside humanitarians in the PoC sites affects his views of the need for distinction, he responds to an imaginary humanitarian actor: 'If you are so concerned, why do you eat in our cafeteria, why do you drink our water, why sleep in our camp, why use our toilets?' In his view, humanitarian actors that reside in the PoC sites—like their counterparts who make direct use of military assets—have weak claims to distinction because 'they still use us'. Notably, this peacekeeper singles out two humanitarian organizations in his remarks: MSF and the ICRC.*

*He appreciates that these independent organizations would strive to avoid public dealings with the military in order to protect staff: 'They don't want to face retaliations and people on the ground need them...' He refers to these two organizations approvingly as the 'military of the humanitarians', meaning that they share certain capabilities, mentalities, and efficiencies with military actors.<sup>120</sup> Meanwhile, UNMISS forces can be found strategizing about how to close the distance between themselves and international humanitarian actors. This dynamic lends credence to the fears of encroachment that animate the practices of humanitarian actors. A Military Liaison Officer (MLO) who works for UNMISS proposes that the trick to fostering proximity with humanitarians is to not act too much like a soldier. 'You really have to adapt yourself and think of people's interests and speak to who they are. When I'm talking to humanitarians, maybe I'll say [here he switches to a much softer and high-pitched voice, adopting a mischievous look] 'Is everything ok? Do you need help?' Like, sympathetic.' One UN peacekeeper goes further: 'In our training, we get the impression that the humanitarians will not talk to us because we are military, but there are ways to make it happen. For example, I will wear civilian clothes to go visit MSF in the north. I won't carry a gun to go to Pibor.'<sup>121</sup>*

In this first set of encounters, international humanitarian actors try to distinguish themselves from UNMISS peacekeeping forces so that local armed actors will not think humanitarians are legitimate targets. Humanitarian actors are thus behaving as though armed UN peacekeepers are, themselves, legitimate targets of attack in armed conflict. Despite the fact that UN peacekeeping forces will generally be afforded civilian protection under IHL,<sup>122</sup> humanitarian actors perceive UN peacekeepers to be tinged with qualities of what we might refer to as 'combatantness' – such as dangerousness, participation and complicity. It follows that the civility of humanitarian actors could become tainted through any association with UNMISS peacekeeping forces, whether real or perceived. Humanitarian actors are not alone in viewing UN peacekeepers as combatant-like,<sup>123</sup> and indeed in some armed conflicts UN peacekeepers are legally categorized as combatants.<sup>124</sup> It is apparent that UNMISS

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<sup>120</sup> Another reason the ICRC might attract this designation is its special status under IHL, as discussed in Section 2.

<sup>121</sup> Pibor is town in Boma state, South Sudan, where MSF has maintained an active presence.

<sup>122</sup> See above in this section.

<sup>123</sup> In my field research I have found that peacekeepers often self-conceptualize as combatants.

<sup>124</sup> Sheeran and Case, *supra* note 115; D. Lilly, 'The United Nations as a Party to Armed Conflict: The Intervention Brigade of MONUSCO in the Democratic Republic of Congo (DRC)', (2016) 20 JIP 313. The combatant status of peacekeepers is contemplated in UN documents. See e.g. Section 1.1 of UN Secretary-General's Bulletin (6 August 1999), 'Observance by United Nations Forces of International Humanitarian Law', UN Doc. ST/SGB/1999/13.

peacekeeping actors, themselves, are keenly aware of their combatant-like characteristics; some are evidently prepared to discard these attributes to foster proximity with humanitarian actors.

At the same time, UNMISS peacekeepers remain perplexed that humanitarians would wish to dissociate from them in the first place – especially given that so many humanitarian actors are visibly enmeshed with the UN mission inside the PoC sites. UNMISS peacekeepers clearly find it enervating that humanitarian actors would continue to rely upon them, while also professing to be bothered about distinction. Further, UNMISS peacekeepers do not believe some humanitarian actors possess the requisite authority to make demands about distinction. Authority here does not refer to a legal authority, so much as a practical authority that humanitarian actors are seen to undermine when they play an active role in blurring the lines themselves. The special accommodation one peacekeeper makes for the ICRC and MSF in the above encounter (‘they don’t want to face retaliations and people on the ground need them....’) is a fairly common practice amongst soldiers and peacekeepers.<sup>125</sup> It might thus be said that the practices of international actors also project a Red Cross (and perhaps MSF) fantasy.

The main point to distill from this first set of encounters is that the idea of distinction is circulating amongst civilian actors. Although the relationships of interest here do not cut along a civilian-combatant divide, I propose that distinction in an IHL targeting sense is still very much in play. Certainly, as a matter of perception, humanitarians are attempting to manage who is seen to be a legitimate target. As the discussion moves on to the second set of encounters, the connection with the IHL targeting rule becomes somewhat more tenuous. Now, humanitarian NGO actors can be found dissociating from UNMISS civilian staff.

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<sup>125</sup> Many military and peacekeeping actors I interviewed and observed for the larger study also referred to MSF and ICRC more approvingly than other humanitarian actors.

Although the civilian identity of these UNMISS actors is even clearer than that of armed peacekeeping forces, humanitarian actors remain intent on asserting a distinction.

### **Encounter 2(a): Humanitarian actors' perspectives on civilian UNMISS staff**

*Summing up the relationship with the UN mission across South Sudan's various PoC sites, a humanitarian actor says: 'I know we are not ideal, I know there are many mistakes done, but we simply need to try to stay away.' As some humanitarian actors see it, UNMISS' military aspects taint the entire mission: 'UNMISS is a mission with a military component, and we can't be seen to have anything to do with this'. Other humanitarians accuse UNMISS civilian actors of blurring the lines through operational decision-making. These civilians work 'with the military people, they fly with their assets, they go on patrol'. One humanitarian actor elaborates, '[W]e have access to places because of our neutrality. We try to distinguish ourselves, by toning down our connections.' He stresses that the ultimate end is to help populations in need. 'It's not out of purity, it's to get access.' International humanitarian actors frame the UNMISS relationship with GoSS as both too warm and too cold. On the one hand, UNMISS is seen as overly friendly with state actors,<sup>126</sup> and too quick to 'jump into normal relations' in hopes of South Sudan finding peace. On the other hand, humanitarian actors fear that a strained UNMISS–GoSS relationship may lead South Sudanese state actors to block humanitarian access to war-affected populations. UNMISS civilian human rights monitors are thus faulted for 'jumping up and down about human rights violations'. Reflecting on tensions with UNMISS, one humanitarian actor posits: 'The real tension is actually with UN civilians, not the UN military'. It is hinted that UNMISS civilians pose bigger distinction problems than military actors because they 'are willing to break the rules' and 'they don't follow orders; they say, "We're not in the military"'. Humanitarian actors also accuse UNMISS civilian actors of competing with them, without having the requisite skills to deliver humanitarian services. To the chagrin of one humanitarian actor, UNMISS civilians think 'they are all humanitarians'. Another humanitarian actor adds: 'They don't know how to measure arms and say "famine".'*

### **Encounter 2(b): Civilian UNMISS staff's perspectives on humanitarian actors**

*The forging of a fault line within the civilian category provokes vexed responses from some UNMISS civilian actors. They fear that humanitarian actors are nudging them closer to the combatant category, disregarding their own legitimate fears about being associated with UN peacekeeping forces. One UNMISS civilian actor recalls an incident in which she and her civilian colleagues were interviewing displaced populations in South Sudan. Unexpectedly, armed UN peacekeepers came up behind her with their weapons visible. Being seen with armed actors, she explains, troubled her in the same way that humanitarian actors profess it bothers them – though she readily acknowledges, 'We're not exactly humanitarians'. Other UNMISS civilian actors comment on the blurring between different types of UN actors, particularly those belonging to the 'black UN' (the political or peacekeeping mission) and 'blue UN' (humanitarian and*

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<sup>126</sup> See also H. Dorussen and M. de Vooght, *Putting Civilians First: NGO Perceptions and Expectations of UN Peacebuilding* (FBA, 2018), 4 (finding that NGOs tend to view the work of UNPol and UN Civil Affairs as supporting governmental and transitional authorities).

*development actors*).<sup>127</sup> *Gesturing to the vehicles driving around South Sudan with black or blue UN logos, one UNMISS civilian actor says with exasperation ‘who the hell knows the difference’. Standing out as something of an outlier, one UNMISS civilian actor professes that even though he has civilian status under IHL, only ‘the humanitarians are civilian in nature’. He concedes: ‘UNMISS is never neutral, [it] tries to be impartial, but not really. Humanitarians are well aware of that perception.’ He emphasizes the fact that humanitarian actors work without a uniform, which sets them apart from all actors associated with the conflict in South Sudan. Notably, he includes UNMISS civilian actors in the latter group. He continues: ‘I am very confident about what I am. I am not humanitarian. We are clearly told that at the induction. They say “We are not humanitarian, we are the black UN”. My car is painted with black. So, that I know so well.’*

Turning first to the relevance of the IHL targeting rule, it is clear that targeting issues are more remote in the interactions of humanitarian actors and UNMISS civilian staff. Nonetheless, I want to suggest that questions of who might be attacked have not slipped away from the picture entirely. Consider, for example, the humanitarian actor who worries about UNMISS civilians flying on military assets. As a matter of optics humanitarian actors are also more likely to be confused with UNMISS civilian staff than armed actors, though, as noted, under IHL these UNMISS actors should not be targeted either.<sup>128</sup>

Returning to the notion of a civilianness continuum,<sup>129</sup> humanitarian actors behave as though UNMISS civilian staff possess, at best, an ordinary kind of civilianness. This situates the latter somewhere in the middle of the civilianness spectrum. UNMISS civilian staff cannot claim a special kind of civilianness, but their civilianness is not thought to be so tainted that they are combatant-like. In the event that they acquire any characteristics of combatantness, however, these UNMISS civilians might slide further towards the wrong end of the

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<sup>127</sup> Humanitarian NGOs have expressed concern about the adverse impact on local perceptions when black UN actors accompany blue UN actors, or when black UN actors use equipment that is branded blue UN. Ibid., 3.

<sup>128</sup> Speaking of confusion also presumes that violence against humanitarian actors is the result of a mistake. On intentional violence against humanitarian actors see L. Hammond, ‘The Power of Holding Humanitarianism Hostage and the Myth of the Protective Principles’, in M. Barnett and T. Weiss (eds.), *Humanitarianism in Question: Politics, Power, and Ethics* (2008), 172.

<sup>129</sup> Although it would be possible to extend this continuum all the way to the furthest combatant side, to limit the scope of the discussion I will focus on the civilian side.

continuum. Such a shift might occur where UNMISS civilian staff travel together with UN peacekeeping forces, for example, or use the assets of the latter. In all of these scenarios, humanitarian actors fear that an affiliation with UNMISS civilian staff could undermine their own civilianness.

Scrutinizing the way in which the idea of distinction circulates in this second set of encounters, I propose that something akin to a process of ‘vernacularization’ is underway.<sup>130</sup> Engaging with the fluidity of distinction as it relates to targeting, humanitarian actors infuse the distinction with other cherished ideas, values, and principles such as competence, virtue, and political neutrality. In this way, the idea of distinction—and with it, the concept of civilianness—is bound up with a larger project of delineating the boundaries of humanitarian action and asserting the moral agency of humanitarian actors.

Unsurprisingly, UNMISS civilian staff take umbrage that humanitarian actors would avoid them and paint them as lesser civilians. The anxieties of these UNMISS actors convey in a visceral sense the way in which a carve-out for some civilian actors could be seen to undermine the status of those left behind. From the vantage point of the first UNMISS civilian staff speaker, who reports uneasiness about being seen with arms-bearers, humanitarian distinction practices push UNMISS civilian staff closer to peacekeeping forces. Intriguingly, this individual’s own colleague within the mission (who suggests that ‘only humanitarians are civilian in nature’) self-conceptualizes as having a lower form of civilianness. This UNMISS actor intimates that humanitarian actors might be the only civilians to be found, leaving opaque the fate of those belonging to the general civilian population in South Sudan.<sup>131</sup> While this

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<sup>130</sup> See P. Levitt and S. Merry, ‘Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States’, (2009) 9 GN 441 (defining vernacularization as a ‘process of appropriation and local adoption of globally generated ideas and strategies’).

<sup>131</sup> See also the discussion in Section 3.2 about perceptions of the general civilian population in South Sudan.

outlook is not an isolated one within the UN mission, I found it to be the exception rather than the norm.

### ***3.4. A dynamic vision of distinction***

This empirical discussion has revealed the manner in which everyday humanitarian-UNMISS interactions are shaped by struggles over distinction. As was shown, humanitarian actors are doing away with a static civilian-combatant binary in their daily practice. While individual humanitarian actors might be well-versed in IHL and articulate the principle of distinction as a bright line binary, a more fluid logic informs both their self-conceptualization and their interactions with others in the operational space. Humanitarian actors envision civilianness as a contingent concept, and they operate according to a continuum along which everything is a matter of degree and subtle gradation.

It is important to emphasize the dynamism of this vision of distinction. Although a given UNMISS actor might be allocated a default position along the civilianness continuum, this is subject to change. It is as though qualities of civilianness and combatantness can be found floating around in the air, attaching to individuals in accordance with their appearance, conduct, and the larger context in which they find themselves. As civilianness is detached from the civilian, any given actor might acquire or shed civilian-like (or combatant-like) characteristics at any moment. In order to secure a spot at the ‘more civilian’ end of the continuum, humanitarian actors are constantly striving to dissociate from any actor who poses a threat of contamination.

While the notion that humanitarian actors embody a purer form of civilianness is clearly contested, many UNMISS actors do contemplate a vision of distinction that departs from a bright line civilian-combatant binary. As a matter of daily practice, then, humanitarian

actors are not the only international actors operating according to a ledger that is not theoretically meant to exist in international law. The final part of the discussion links these dynamics back to IHL's principle of distinction, offering a theory of the humanitarian actor as a special civilian figure.

#### **4. Theorizing the 'civilian plus'**

It was established earlier in this article that, under IHL, humanitarian actors and UNMISS actors alike will generally be categorized as civilians.<sup>132</sup> As a matter of on-the-ground practice, however, it has been shown that the idea of distinction circulates to make (civilian) humanitarian actors distinguish themselves from (civilian) UNMISS actors. These dynamics do more than bend the civilian-combatant binary: they break it apart and re-make it in new forms. This final part of the discussion analyses the way in which distinction is being made and re-made in everyday practice, elucidating the theory of the 'civilian plus'.

To convey the implications of these everyday distinction practices for IHL's civilian category I now introduce three new entities, each of which occupies a discrete position on the civilianness continuum described earlier. To begin, I propose that we think of this continuum as being punctuated by three discrete civilian statuses. The furthest, most civilian, point on the civilianness continuum is designated 'civilian plus'. This status might be ascribed to individuals who are already imbued with qualities of civilianness, and who express particularly strong or undiluted features associated with the civilian. Individuals positioned here may be viewed as especially virtuous, innocent, harmless, and outside of the conflict – with civilian women and children traditionally serving as the paradigmatic examples. At the other end of the continuum lies the 'civilian minus', a figure tinged with combatantness who is seen to be entangled in the

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<sup>132</sup> See Sections 2.1 and 3.3.



conflict and potentially dangerous. This lesser civilian status might affix to individuals who initially possess civilian immunity but do something to undermine it - one example would be through DPH. In the middle of this continuum, one finds the 'mere civilian'. This default status is available to those civilians who are not eligible for special treatment, and who also do not present any of the features of combatantness. While the 'mere civilian' is not stripped of any core quality of civilianness, I propose that this entity is worse off in a relative sense than both the 'civilian plus' and the mythical civilian figure associated with a (non-existent) unified civilian category.<sup>133</sup>

The status humanitarian actors long for, ultimately, is 'civilian plus' status. Humanitarian actors ground their claim to this special status in the social value of the public service they perform in war, and the concomitant exposure to harm they face. It was suggested earlier in this article that, through a 'vernacularization' process, humanitarian actors infuse distinction in the IHL targeting sense with values such as neutrality, virtue and competence. Complicating matters, the same professional role that would legitimize exceptional treatment for humanitarian actors might equally bring their civilianness into question. By providing services in the midst of on-going hostilities, humanitarian actors potentially implicate themselves in the conflict in ways that other, ostensibly passive, civilians do not. Even, and perhaps especially, when humanitarian actors engage in quintessentially humanitarian tasks—such as food provision—there might be suspicions that they are aiding one party to the conflict. This is before one considers various militarized and securitized aspects of humanitarian aid,<sup>134</sup> such as the direct use of military assets.<sup>135</sup> It can thus be said that

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<sup>133</sup> It was argued in Section 2 of this article that this unified category is, in fact, non-existent.

<sup>134</sup> M. J. Beerli, 'Saving the Saviors: Security Practices and Professional Struggles in the Humanitarian Space', (2018) 12 IPS 70; Andersson and Weigand, *supra* note 107.

<sup>135</sup> M. Pugh, 'The Role of Armed Protection in Humanitarian Action' in *Humanitarian Action: Perception and Security*, European Commission Seminar proceedings (European Commission Humanitarian Office and International Committee of the Red Cross, Lisbon 27–28 March 2007).

humanitarian actors' bid for 'civilian plus' status is accompanied by—and, perhaps, saturated with—a sense of dread that a lesser civilian status will affix to them instead. Hence the move to dissociate from all those actors who are perceived to merit only 'mere civilian' or civilian minus' status. On this account, the prospect of having one's civilianness downgraded is a live issue for Red Cross actors and 'other' humanitarian actors alike.<sup>136</sup>

As a point of clarification, the civilian plus/mere/minus terms are not ones that humanitarian actors themselves employ. They are, rather, concepts I am proposing for their analytical utility. The trade-offs of this kind of descriptive exercise must be made explicit. First, this move to label risks losing the fluidity of actual practice, the importance of which has been emphasized at various junctures throughout the discussion. It may be more accurate to think of the civilian thinning and thickening, waxing and waning, ascendant or descendant.<sup>137</sup> Second, the introduction of new categories replicates IHL's tendency to over-taxonomize; this is arguably the very same issue that generated the problem under discussion here. A further, ethical, concern also arises, in that names are being given to lesser civilians in the context of a discussion about—amongst other things—protection in armed conflict. Without making light of these drawbacks, this conceptual exercise retains considerable value for how it makes messy on-the-ground practices legible to (also-messy) IHL.

### ***Conclusion***

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<sup>136</sup> In raising the possibility that humanitarian actors might be viewed as ordinary or lesser civilians, I do not mean to suggest that they would be mistaken for the general civilian population. On the whole, expatriate humanitarian actors will materially appear very different from local civilian populations; much has been written about the white SUVs, offices, and lodgings of the former. See especially L. Smirl, *Spaces of Aid: Post Disaster Relief and Reconstruction* (2015); M. Duffield, 'Risk-Management and the Fortified Aid Compound: Everyday Life in Post-Interventionary Society', (2010) 4 JIS 453, at 471.

<sup>137</sup> I wish to thank Mark Drumbl for this alternative language.

This article brings the everyday practices of international actors in South Sudan into direct contact with IHL's civilian concept. It has been shown that IHL's principle of distinction functions to make international civilian actors distinguish themselves from each other. It is evident that humanitarian and UNMISS actors alike have internalized some version of distinction, and they can be found jostling with one another for the status they wish to claim on a daily basis. It is also apparent that some of the things that international actors are doing with distinction render it unrecognizable as a civilian–combatant binary. The practices that have been described in this article splinter IHL's ostensibly unified civilian category, setting up a continuum of civilianness. As floating signifiers are seen to affix to individuals and imbue them with different gradations of civilian purity, intra-civilian struggles ensue.

The distinction practices that humanitarian actors enact can be understood as a bid for legibility, so that they might be rendered intelligible in IHL and in the eyes of other actors as a special kind of civilian. By introducing three new civilian figures, all of which are strange to IHL, this discussion has offered an account of the way in which the idea of distinction is being bent, stretched and splintered. In the end, these unfamiliar civilian categories can offer no replacement for the mythical civilian figure; these new entities are as complex and fragile as the civilian category they unsettle. But it has also been stressed throughout this discussion that there is no such thing as a unified civilian category or a stable distinction. Rules such as DPH topple claims to the contrary, as does the circulation of IHL's Red Cross fantasy. The inevitable conclusion is that the idea of distinction is perpetually disrupted – historically, doctrinally and in everyday practice.

What does it mean if distinction is a perpetually disrupted idea? Sarah Nouwen's articulation of the two souls dwelling in each socio-legal scholar strikes a chord.<sup>138</sup> One soul seeks to clarify and explain, while the other is overwhelmed by the complexity of what has been found.<sup>139</sup> There is a temptation to simplify what is messy, but given the multiplicity this article contends with, it seems problematic to offer neat assertions about what should be done. Indeed, an explicit intention of this discussion has been to defer normative questions in order to describe and, ultimately, to better understand, distinction as a practice. Furthermore, it is not necessarily desirable to have legal rules that reflect empirical reality. Alexander rightly locates the value of IHL's civilian entity in its very artificiality: it aims not to reflect but to supplant the realities of war-affected populations.<sup>140</sup> Whatever distance there is between a real-life civilian and the IHL version, from this vantage point, is understood to be an achievement.<sup>141</sup> Taking a cue from these insights, I am not calling here for legal reforms that make the principle of distinction more reflective of actual practice. My aim is to entreat IHL lawyers to think of the humanitarian-peacekeeper interactions that have been described here as a problem for IHL's principle of distinction. More broadly, the article extends an invitation to sit with the indeterminacy of international legal rules and spend time in a world where distinction's perpetually disrupted nature no longer remains hidden.

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<sup>138</sup> S. Nouwen, 'As You Set Out for Ithaka: Practical, Epistemological, Ethical and Existential Questions about Socio-legal Empirical Research in Conflict', (2014) 27 LJIL 227, at 233.

<sup>139</sup> Ibid.

<sup>140</sup> Alexander, *supra* note 90, at 36.

<sup>141</sup> Ibid., 35–36.